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No. 97-156

In the Supreme Court of the United States

OCTOBER TERM, 1997

RANDON BRAGDON, D.M.D.,
PETITIONER,
v.
SIDNEY ABBOTT ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT SIDNEY ABBOTT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiff Sidney Abbott, a person who is infected with HIV, is an individual with a disability under the Americans with Disabilities Act (ADA)?

2. Whether the lower courts properly reviewed the factual record in rejecting the Petitioner's "direct threat" defense -- when public health authorities and the American Dental Association agree that it is safe to provide such treatment, and HIV transmission from a patient to dentist has never been demonstrated?

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STATEMENT OF THE CASE

This action was brought under the Americans with Disabilities Act (ADA) to enjoin defendant Randon Bragdon, a dentist, from applying his blanket policy of refusing under any circumstances to provide routine dental care to patients, including the plaintiff, Sidney Abbott, solely because they have tested positive for the human immunodeficiency virus (HIV).

In contrast to popular perception, HIV is difficult to transmit. According to Dr. Bragdon's own expert, "HIV is

a disease of low infectivity." App. 257.[1] Although over one billion dental procedures have been performed by over 250,000 dental health care workers in the past fourteen years, and approximately 1,000,000 individuals in the United States are estimated to be infected with HIV, there has never been a documented case of HIV transmission from infected patient to dental health care worker, nor from infected patient to noninfected patient. App. 105, 112.

The American Dental Association, the leading dental association in the United States, has had a policy since 1988 which states:

> Patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed. Such infection control procedures provide protection for both patients and dental personnel.

American Dental Association's *Policy Statement on AIDS, HIV Infection and the Practice of Dentistry* (1988: 457; 1991: 591), App. 273.[2]

On September 16, 1994, Sidney Abbott arrived at Dr.Bragdon's office for a previously-scheduled appointment. App. 240-241. In response to written and verbal inquiries

[1] "App." refers to the Joint Appendix filed with the Court of Appeals.

[2] *See also Amicus Curiae* Brief in the Court of Appeals of Rhode Island Department of Public Health, Department of Public Health of Commonwealth of Massachusetts, Bureau of Health of the Maine Department of Human Services, American Public Health Association, Association of State and Territorial Dental Directors, and Association of State and Territorial Health Officials (the "Public Health Brief") ("There is a uniform consensus among public health authorities, including the United States Centers for Disease Control and the Public Health Amici submitting this brief . . . that it is safe to provide routine dental care to patients with HIV in a private dental office with standard infection control procedures used for all patients.").

from Dr. Bragdon about her medical history and HIV status, Ms. Abbott informed him that she had tested positive for HIV. Dr. Bragdon examined Ms. Abbott and diagnosed a cavity which required a filling. App. 241. Dr. Bragdon told Ms. Abbott that he was not willing to fill her cavity in his office because she has HIV. App. 227 (p. 268).

Although Dr. Bragdon represented to Ms. Abbott on September 16, 1994 that he would treat her in a hospital setting, Dr. Bragdon had not even applied for privileges to treat patients at any hospital. On November 1, 1994, more than one month after Ms. Abbott filed a complaint against Dr. Bragdon at the Maine Human Rights Commission, Dr. Bragdon for the first time applied for hospital privileges at Down East Community Hospital in Machias, Maine. App. 278. Machias is approximately a two-hour drive from Bangor, and Dr. Bragdon insisted that Ms. Abbott would have to pay for the added cost of the surgical operatory there. App. 227. Defendant Bragdon's application for hospital privileges was never granted and even today he lacks privileges to treat patients at any hospital.[3]

Ms. Abbott filed a complaint in the United States District Court for the District of Maine in December, 1994 and the United States intervened in support of Ms. Abbott's position. After discovery was completed, the District Court granted summary judgment for Ms. Abbott and plaintiff-intervenors United States and Maine Human Rights Commission on all liability issues. *See Abbott* v. *Bragdon*, 912 F. Supp. 580 (D. Me. 1995). (31a) (referring to the Appendix to the Petition).

[3] Moreover, the undisputed testimony in the District Court demonstrated that it is equally safe to treat a dental patient with HIV in a private dental office like Dr. Bragdon's as in a hospital setting. Dr. Bragdon's expert stated that the only way in which a hospital setting reduces the risk of HIV transmission to a dentist is that Dr. Bragdon would have more "time to deal with the patient" in a hospital setting. App. 264 (pp. 156-157).

The District Court ruled that Ms. Abbott is disabled under the ADA because HIV is a physical impairment that substantially limits her major life activity of reproduction. 912 F. Supp. at 585-587. (31a-41a).[4] The District Court rejected Dr. Bragdon's defense that the provision of routine dental care in his office rises to the level of a "direct threat to the health or safety of others" under the ADA. (41a-52a). The District Court determined that Dr. Bragdon had presented only "speculation," "conjecture," and "tangential statistics" to support his assertion that the performance of a dental procedure, such as filling a cavity, would create a significant risk of HIV transmission. 980 F. Supp. at 588-589. (44a-45a).

Dr. Bragdon appealed the District Court decision to the United States Court of Appeals for the First Circuit. Based on a careful examination of evidence in the record, the Court of Appeals ruled that Sidney Abbott is protected from discrimination under the ADA because HIV is a physical impairment[5] which substantially limits the major life activity of reproduction. 107 F.3d at 939-942. (5a-15a). The Court reached this conclusion based on Ms. Abbott's own uncontradicted testimony that after she learned that she tested positive for HIV, she decided not to have children because of the risk of infecting the child. 107 F.3d at 941. (13a). In addition, the Court of Appeals, like the District Court, examined all of Dr. Bragdon's evidence on his "direct threat" defense and concluded: "Each piece of evidence is too speculative or tangential (or in some instances, both) to create a genuine issue of material fact." *Id.* at 947. (29a). The Court of Appeals reviewed the record for cumulative proof and was "satisfied that the evidentiary proffers canvassed above, insufficient in themselves, are likewise insufficient in combination to call into legitimate question the lower court's entry of summary judgment." 107 F.3d at 948. (29a). On April 22, 1997, the Court of Appeals denied Dr. Bragdon's petition for rehearing and suggestion for rehearing en banc.

[4] Contrary to Dr. Bragdon's assertions [Petition, at 7 n.6], Ms. Abbott also argued in both the District Court and the Court of Appeals that she is covered under the "regarded as" prong of the statutory definition of disability in the ADA because Dr. Bragdon excluded her from dental services based on his misperception that HIV is too contagious. *See* Brief in First Circuit of Sidney Abbott at pp. 31-34. The United States also made this same "regarded as" argument below.

[5] There was undisputed expert testimony submitted in the District Court that from the initial onset of infection, HIV results in abnormalities to the blood, lymph and immune systems which begin to destroy an individual's ability to fight off infection. App. 306.

REASONS FOR DENYING THE PETITION

I. THERE IS NO NEED FOR THIS COURT TO REVIEW THE LOWER COURTS' DETERMINATIONS THAT PLAINTIFF SIDNEY ABBOTT IS AN INDIVIDUAL WITH A DISABILITY UNDER THE ADA.

A. *This Case is Unsuitable For This Court to Decide if Reproduction is a "Major Life Activity" Under the ADA.*

This Court should decline to decide if reproduction is a major life activity for two reasons. *First*, the issue has only begun to be reviewed by courts of appeals in the past year and only one court of appeals has issued a ruling contrary to the First Circuit. *See Krauel* v. *Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996).[6] The First Circuit correctly held that reproduction is a "major life activity" under the ADA. 107 F.3d at 939-941. (6a-14a). Analyzing the statu-

[6] In the Petition, defendant Bragdon seeks to inflate this narrow difference of opinion by citing district court decisions and decisions which contain only dicta. Petition at 5-6, n. 3-5. In addition, defendant cites *Zatarain* v. *WDSU-TV, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996). Because *Zatarain* was affirmed without opinion, it is not a ruling as to whether reproduction is a major life activity under the ADA. *See* Local Rule 47.6 of the United States Court of Appeals for the Fifth Circuit (affirmance without opinion has no precedential value and may be based on any number of grounds).

tory text, the Court of Appeals noted that "major" denotes "comparative importance" and concluded that "reproduction, which is both the source of all life and one of life's most important activities, easily qualifies under that criterion." 107 F.3d at 939. (8a).[7]

By contrast, the *Krauel* decision is fundamentally flawed because that court ignored the starting place for statutory interpretation -- the broad language of the statute itself -- and instead focused solely on one narrow section of the regulations.[8] This Court should allow further development of the law by the courts of appeals before considering the issue whether reproduction is a major life activity under the ADA. *See, e.g., McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied when issue presented requires "further study" in lower courts "before it is addressed by this Court").

Second, this is not a suitable case for this Court to decide whether reproduction is a "major life activity" under the ADA because that issue is not outcome determinative in this case. Ms. Abbott and the United States both argued below, in the alternative, that she satisfied the definition of disability under the ADA because she was "regarded as" disabled. *See* 42 U.S.C. § 12102(2) (C). This alternative theory of disability is strongly supported by this Court's prior decision in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). In

[7] The Court of Appeals also based its conclusion on Congress's intent to give a broad definition to the term "disability" and the language of the ADA's implementing regulations. 107 F.3d at 939-940. (8a-9a). The First Circuit further noted this Court's recognition of the right to conceive and raise children as "essential" and "basic." 107 F.3d at 939 (*quoting Stanley* v. *Illinois*, 405 U.S. 645, 651 (1973)). (8a).

[8] The regulations define "major life activities" to mean "functions *such as* caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. Section 36.104 (emphasis added). As the First Circuit observed, the list is not meant to be exclusive and "reproduction—one of the most natural endeavors—fits comfortably within its sweep." 107 F.3d at 940. (9a).

Arline, this Court emphasized "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment" and that it would be unfair to allow a defendant "to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, 480 U.S. at 282, 284 (footnotes omitted). Thus, even if this Court were to rule against Ms. Abbott on the procreation issue, she could still prevail on her "regarded as" claim which the First Circuit did not need to address. If this Court wishes to resolve the procreation issue, it should wait for a case in which that issue is outcome determinative.

B. *There is No Conflict Among the Courts of Appeals About Whether an Individual Who is Infected With HIV, But Who is Asymptomatic, is "Disabled" And Therefore Protected By the ADA.*

The Court should not grant certiorari on Petitioner's second issue because the First Circuit did not base its decision that Ms. Abbott is disabled under the ADA on the holding that HIV is a "per se" disability and because the Fourth Circuit has not issued a majority decision on this issue. Rather, the First Circuit decided that Ms. Abbott is disabled based on her testimony of a substantial limitation to the major life activity of reproduction. 107 F.3d at 939-942. (6a-15a)[9].

Contrary to claims of defendant Bragdon, no clear conflict exists among the other courts of appeals concerning whether all persons with HIV are "per se" disabled under the ADA. *See* Petition at 10. The Fourth Circuit, which Bragdon claims has held that asymptomatic individuals with HIV are not "per

[9] The First Circuit added a "final observation," and Ms. Abbott strongly agrees, that Congress's intent that HIV-infected individuals be covered under the ADA bolsters the court's independent conviction based on the record that Ms. Abbott is disabled under the ADA. 107 F.3d at 942. (15a).

se" disabled, has not taken a clear stand on this issue. In *Runnebaum* v. *Nationsbank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997), 1997 WL 465301 (August 15, 1997), the only majority decision reached by the Court en banc affirmed the District Court's dismissal of the case on the grounds that the plaintiff did not forecast sufficient evidence to survive summary judgment that he was fired from his job for a discriminatory reason. *See* Opinion of Williams, J. and Concurring Opinion of Hamilton, J.

Less than a majority of the Court (six of twelve judges) joined an opinion holding that the plaintiff was not disabled under the ADA, with six members ruling that the issue was not properly before the Court. *See* Dissent of Michael, J. and Concurring Opinion of Hamilton, J. This unresolved internal dispute among the judges of the Fourth Circuit does not warrant review by this Court. *See, e.g., Davis* v. *United States*, 412 U.S. 333, 340 (1974).[10]

Defendant Bragdon does not point to a majority decision of any court of appeals which holds that people with HIV are not protected by the ADA. To the contrary, there has been a virtual consensus of judicial authority that people with HIV are squarely within the protections of the ADA. *See, e.g., Gates* v. *Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) ("[W]e hold that a person infected with the HIV virus is an individual with a disability within the meaning of the [Rehabilitation] Act"); *Doe* v. *Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990) (In case where plaintiff had asymptomatic HIV, court stated that "[I]t is well established that infection with AIDS constitutes a handicap for purposes of the [Rehabilitation] Act."), *cert. denied*, 499 U.S. 904 (1991).

[10] Similarly, another Fourth Circuit decision, *Ennis* v. *National Ass'n of Business & Educ. Radio*, 53 F.3d 55 (4th Cir. 1995), provides only dicta on the issue of HIV as a disability. In that case, the Court assumed the existence of a disability for purposes of the ADA because the record was undeveloped on that issue. 53 F.3d at 60. The Court then upheld summary judgment for the employer on independent grounds. 53 F.3d at 61-62.

To the extent that some judges in *Runnebaum* interpret the definition of disability in the ADA as excluding people with HIV, the most that can be said today is that such an interpretation is an aberrant view which does not even reflect the majority of the Fourth Circuit. The Fourth Circuit will likely have an opportunity to revisit this issue in the future. This Court should decline to address the issue of HIV as a protected disability under the ADA when, in fact, no real split of authority exists. The Court should wait until such time as there may be a clear conflict in the courts of appeals.

II. DEFENDANT BRAGDON ALLEGES ONLY THAT THE COURT OF APPEALS MADE ERRONEOUS FACTUAL DETERMINATIONS ON SUMMARY JUDGMENT ON THE "DIRECT THREAT" ISSUE.

This Court should not revisit the careful, record-based determinations of the District Court and Court of Appeals, which found that Bragdon presented only conjecture about the future possibility of a risk which has never occurred in the fourteen years of the HIV epidemic. *See* United States Supreme Court Rule 10 ("A Petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) (Supreme Court should not "undertake to review concurrent findings by two courts below in the absence of a very obvious and exceptional show of error"). The Court therefore should deny the Petition on the "direct threat" issue even if the Court were to grant the Petition on questions one or two in the Petition.[11]

[11] Dr. Bragdon waived below any claim that he was an expert on infection control practices or infectious diseases and thus his third and fourth questions presented are not properly raised on this record. Similarly, on appeal he waived any reliance on his only expert witness, Dr. Sanford Kuvin. 107 F.3d at 946 n.8. (24a).

Defendant Bragdon does not cite any Court of Appeals decision or any decision of this Court which is in conflict with the First Circuit's determination that he failed to establish that the provision of routine dental care to patients with HIV is a "direct threat." In fact, courts uniformly have ruled that the "direct threat" defense is insufficient as a matter of law to justify a refusal by a dentist to treat a person with HIV.[12]

Rather, defendant Bragdon asks this Court to sift through a "sampling of facts in the record" (Petition, p. 13) and second guess the determinations of the District Court and the Court of Appeals that he presented only conjecture and speculation in support of his "direct threat" defense. The Petition does nothing more than repeat the same list of inaccuracies and mischaracterizations which two lower courts have already rejected. Ms. Abbott will not respond to each false statement in the Petition. As an example of the type of evidentiary leap which characterizes Bragdon's "direct threat" defense, defendant Bragdon points to a Food and Drug Administration (FDA) recommendation that persons who have had contact with a patient's blood refrain from donating blood for a year. Petition at 14-15. That, according to Bragdon, is evidence of a "significant risk" of HIV transmission in dentistry. *Id.* The FDA, however, has not made any determination concerning risks of occupational transmission of HIV to dentists. As the First Circuit correctly observed, the FDA may seek to "avoid minute risks and take unusual precautions even in the absence

[12] *See D.B.* v. *Bloom*, 896 F. Supp. 166, 170 n.6 (D. N.J. 1995) (HIV-positive individual may be safely treated in private dental office which utilizes precautions and "no medically justified reason existed" for discrimination); *United States of America* v. *Morvant*, 898 F. Supp. 1157, 1166-1167 (E.D. La. 1995) (rejecting "direct threat" argument and noting a "plethora of expert testimony" that following the CDC recommendations significantly mitigates any risk); *Minnesota* v. *Clausen*, 491 N.W.2d 662 (Minn. Ct. App. 1992) (noting the overwhelming evidence, including the American Dental Association policy, that "HIV-positive patients may be safely treated in a private dental office which utilizes universal precautions").

of actual evidence of danger" to safeguard the blood supply. 107 F.3d 946. (24a-25a).[13]

In addition, many of defendant Bragdon's claims merely state that a risk of HIV transmission in dentistry exists because dentists sometimes come into contact with a patient's blood.[14] The truism that a dentist may sometimes come into contact with a patient's blood, however, does not come close to providing any evidence that HIV has ever been transmitted from patient to dentist, nor does it illuminate the degree of probability of such occurrence. Exposure to blood is not synonymous with infection or actual transmission of HIV. App. 343-344. HIV is a virus of low infectivity, and any exposure to a patient's blood during a dental office procedure occurs in small amounts which have never been shown to result in transmission of HIV. App. 344, 394. Similarly, while Bragdon claims that HIV can be transmitted by aerosols from the high speed dental drill (Petition at 19), even Dr. Bragdon's own expert testified that "there's no evidence to suggest that aerosol spray can transmit HIV". App. 268.; 107 F.3d at 946-947. (26a-27a).[15]

Dr. Bragdon claims that he only wanted to take the same precautions as are routinely taken by dentists in "big cities"

[13] The Petition also claims that the Occupational Safety and Health Administration (OSHA) Bloodborne Pathogen Standard provides evidence of a "significant risk" of HIV transmission in dentistry, although Bragdon never made any such claim in the Court of Appeals and thereby waived this argument. Petition at 13-15. In any event, OSHA found that the use of universal precautions "substantially reduces" the risk of transmission of HIV and Hepatitis B in the health care setting. *See* 56 Fed. Reg. 64004, 64038 (1991).

[14] *See, e.g.*, Petition at 14, 15-16 (claiming that "universal precaution" infection control procedures do not entirely eliminate all exposure to patients' blood).

[15] Dr. Bragdon cited a 1991 study by Johnson and Robinson which, on its face, states only that it raises the question of HIV transmission through aerosols and that "[f]urther work is required to determine whether such a risk exists." App. 424.

(Petition at 20) and that "providers specifically preferred by HIV-infected patients take significant additional precautions to protect themselves." Petition at 30. There is no support anywhere in the record for these assertions.[16] Dr. Bragdon's own expert testified that he was not aware of any hospital which automatically uses different infection control procedures beyond universal precautions for HIV-positive patients. Deposition of Sanford Kuvin, M.D., Docket No. 58, p. 263. In addition, Dr. Bragdon's expert was not aware of any authority for the view that all patients with HIV should be referred outside the dental office for routine dental care. App. 255. Bragdon's expert specifically declined to endorse Dr. Bragdon's policy of automatic referral of HIV-positive dental patients. App. 255.[17]

The Court of Appeals' conclusion is consistent with all other judicial authority and the scientific consensus of the United States Centers for Disease Control, the American Dental Association and numerous other public health authorities, including those submitting the Public Health Brief in the First Circuit. *See supra*, n.2. Indeed, if Dr. Bragdon's speculative ideas were sufficient to be the basis for a finding of "direct threat," then any hospital could lawfully refuse to draw blood or insert an intravenous line in a patient with HIV. The result would be a medical disaster for the almost one million people in this country living with HIV and a public health disaster for society in general.

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[16] As additional evidence of how defendant Bragdon misstates the record, his Petition references an anecdote from one of Dr. Bragdon's colleagues and a "confidential document" lodged with the Court, neither of which were in the record below or provide any evidence to support his "direct threat" defense.

[17] Dr. Bragdon claimed that he had the absolute right to refuse treatment of Ms. Abbott, not that a hospital procedure was safer than an office procedure. Therefore, the Court of Appeals did "not address whether it is illegal under the ADA for a dentist to take additional precautions when treating HIV-infected patients." 107 F.3d 934 at 942 n.4. (16a). Dr. Bragdon waived below any claim that "hospital treatment was significantly safer than office treatment." *Id.*

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

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